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LEGAL RESPONSIBILITY FOR A PURE WATER SUPPLY¹

BY JOHN WILSON²

The author understands he was asked to write a paper on this subject because he happened to be more or less closely associated with the typhoid epidemic at Mankato in 1908 and the legal proceeding resulting from it. The Mankato case in many ways was by no means an exceptional one; in fact it may be regarded as typical of the general municipal waterworks plant. There had never been any expert supervision of the quality of the water, there were few records and one mistake followed another just about as fast as election day came round and the victors took the spoils.

The history of Mankato's water supply as secured from a few of the old settlers is interesting. Some of the early officials were of the opinion that subterranean caverns existed and these were filled with water under great pressure. Now, if the crust overlying these caverns could be punctured the water would, of course, spout forth. In fact, it was only a matter of drilling deep enough before one such cavern would be encountered.

The first experiment was tried in 1874 and 1875 at a cost of \$12,000. A well was drilled on the hilltop to a depth of 2204 feet. The elevation was selected in order to eliminate pumping and at the same time secure fire pressure in the mains. So firmly was the cavern idea fixed in their minds that they even found evidence of their existence while drilling. In their report on the well, they said: "At 1160 feet the drill fell a little and water rose 10 feet higher, at 1975 feet the drill again dropped and the water rose another 10 feet."

The drilling of this well did, however, reveal the fact that artesian water could be secured by drilling at the foot of the hill instead of at the top. But here the cavern idea again came up; these caverns

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would in time become empty, and the city would be obliged to look elsewhere for water. For this reason it was decided to locate the pumping station on the river bank. Just how it happened that the location selected was at the outlet of the main sewer the author was never able to ascertain, except that ground could possibly be secured there at small cost.

Previous to 1908 four wells had been drilled. These wells developed a pressure of from 10 to 12 pounds per square inch at the ground surface, and the discharge flowed by gravity to the pump. The pump was located in the basement, several feet below the ground surface.

The character of the water was such that the well casing did not last very long. It was much less trouble to fix up by-passes and waste than to repair wells. The main sewer passed within a few feet of the well and just in front of the pumping station. Accordingly a connection was made with the sewer and suction main, so that as soon as the pump was stopped the wells would flow into the sewer.

It was later decided to discharge the ashes into the river by flushing and another pipe was laid connecting the river and pumping station. This pipe being at a lower grade than that between the suction main and sewer, the waste from the wells flowed directly to the river. The Minnesota River at times reaches a very high stage and has on several occasions flooded the basements in the business section of the city.

In order to safeguard against backing up the sewage, a sluice gate was placed in the sewer and a 5-inch centrifugal pump installed to take care of the discharge of a 36 by 54-inch brick sewer of the combined type. In order to complete conditions favorable for polluting the water, a small brick cistern was constructed around the well casing of one of the wells, and an overflow laid to the sewer just below the sluice gate.

The river reached a very high stage, and began to back up the sewer. There was a heavy rain. Nevertheless the sluice gate on the sewer was closed, the ash discharge pipe plugged, and the 5-inch pump started up. There was no record of the 18-inch connection between the sewer and pump suction and the men in charge did not know that such a thing existed.

The surplus sewage over what the little pump could care for had but one outlet, that was back through the suction main into the

cistern around the well and then through its overflow to the lower side of the sluice gate. Thus a mixture of sewage and water was discharged into the mains and passed on to the consumers.

This pollution resulted in between 4000 and 6000 cases of diarrhoea, 417 cases of typhoid and 35 deaths. The city officials realized the seriousness of the legal situation confronting them, and engaged the best legal talent available to assist the city attorney. If the city should be held liable the resulting claims might amount to as much as \$10,000,000, while the total valuation of the city was but \$4,000,000.

Fortunately for the city, the facts connected with infection of the water were not generally known; a number of explanations had been offered, but most of them were quite wide of the mark.

The uncertainties connected with the case made the majority of people very slow to start legal proceedings; there were, however, two cases started and many more waited to see how these fared in the courts before taking similar action. In the meantime, the city's legal advisers adopted every possible means of delaying proceedings, hoping in this way to postpone a decision until the period of limitation had expired, for, as one of the attorneys said, "If the facts ever get before a jury we stand no show whatever."

It had long been admitted that a private corporation was responsible for the character of the water furnished; but the general theory is that a municipality is exempt or immune from liabilities unless the statutes specifically state the contrary. The city demurred on the ground that they were exercising a government function and were not engaged in a commercial enterprise and were, therefore, exempt from all liability. The District Court held for the city; the case was taken to the Supreme Court, which reversed the District Court. The city then asked that the case be opened for re-argument, which petition was denied. In the meantime, the period of limitation had expired. The city, therefore, settled the two cases, thus ending the litigation without trial on their merits.

As to the general rule of immunity, the Supreme Court said:

Defendant's argument would have had much more weight, if it had referred the court to a single case in which, under like circumstances, the rule of immunity had applied. This defendant has failed to do and we believe for the perfectly good and natural reason that there is no such authority. Certainly *Hughes vs. Auburn*, 161 N. Y. 96 to which defendant now calls our attention, is not an authority; to the contrary, this case did

not involve liability in the conduct of water works at all. The cases concerning the inadequacy of water supply for fire departments, it is perfectly obvious, involve essentially different circumstances from those presented by the case at bar.

As to the city exercising a government function in operating a waterworks, the court quoted from the dissenting opinion of Judge Elliott in a case where East Grand Forks sought to collect the water bills of a tenant from the owner of the property:

When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is not to govern the inhabitants but to make for them and itself private benefit. As far as the nature of powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts for a private corporation to supply the water. It is not in either case exercising a municipal function. When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as a private corporation or individuals.

The court said further:

It is obvious that a sound policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged.

In denying the application for re-argument, the court made the following statement:

The decision rested in effect upon this supreme consideration, namely, that public policy requires the conservation of human life, the preservation of public health and the establishment of public sanitation on a firm and certain basis in the law.

Section 8787 of the General Statutes reads as follows:

Every owner, agent, manager, operator, or any one having charge of waterworks, furnishing water for public or private use, who knowingly permits the appliances of the same to become in a filthy condition, or in such condition that the purity and healthfulness of the water supplied by reason thereof becomes impaired, shall be guilty of a felony, and punished by imprisonment in the state prison for not more than ten years.

It will thus be noticed that while the Supreme Court in the Mankato case establishes the fact that a municipality may be held responsible for the purity of its water supply, the state law would hold the municipal officers personally responsible.

The trouble at Mankato was purely an accident, resulting from general carelessness and intrusting administrative details to incompetent supervision. However, one must admit that the court's decision is based on the fundamental principle of right and justice.

One can conceive of a great many cases differing slightly from the Mankato case, but where the general principle is much the same; for example, the emergency intake where polluted water may be used for the purpose of extinguishing fires. The principal difference here is that contamination of the supply is deliberately arranged for, and life and health risks are assumed in order to reduce fire risk at the lowest possible cost. The same is true of the so-called dual connection at industrial plants. And it would seem that in either case not only does the municipality become subject to claims because of resulting sickness, but the officials also become personally responsible. Surely, if consideration is to be shown, a case such as that at Mankato, where there was no deliberate action or knowledge that risks were being assumed, would be given the preference over deliberate action and full knowledge that risks were being assumed for pecuniary reasons.

One thing the Supreme Court seemed to emphasize was that a municipality in extinguishing fires is exercising its police powers and cannot be held responsible for an inadequate water supply; therefore, if an official should be confronted with the alternative of polluting the water supply or furnishing an inadequate supply for fire purposes, he might be held legally responsible in the former case but not in the latter.

Then again we have the case where the source of supply is badly polluted, but due to a lack of appreciation of such conditions on the part of the people, the water continues to be used.

The author's legal friends seem to be of the opinion that a community, in voting in favor of such a supply, does not necessarily incur responsibility, inasmuch as in exercising their rights of franchise they are not acting as a responsible body although there is a possibility that officials in carrying out the will of the people as expressed at an election become responsible, as they do constitute a responsible body.

Section 8759 of the Minnesota General Statutes, defining a public nuisance, reads in part as follows:

A public nuisance is a crime against the order and economy of the State, and consists in unlawfully doing an act or omitting to perform a duty, which act or omission:

1. Shall annoy, injure, or endanger the safety, health, comfort, or repose of any considerable number of persons;
2. Shall offend public decency;
3. * * * *
4. Shall in any way render a considerable number of persons insecure in life or the use of property.

In all of the three preceding cases, when there is knowledge that pollution exists, or that risks of pollution have been assumed, it seems reasonable to the author's mind to say that it constitutes a public nuisance, inasmuch as they all endanger the safety, health, comfort, or repose of a considerable number of persons; and it certainly does offend public decency to think that the public must assume the risk of drinking contaminated water, in order that the cost of fire insurance risks may be reduced in a few cases.

The legal responsibility for a pure water supply is a very important matter and worthy of careful consideration by a man of legal training and wide professional experience; and the author regrets very much his incapacity to do the matter justice.

DISCUSSION

J. C. FLANAGAN: The writer has carefully scrutinized the laws of Minnesota with respect to this subject, and also has consulted with members of the Legal Department of the City of St. Paul relative to the matter. He finds that where a charter is granted to a water company, it has a legal right to lay its pipes and mains in the streets of the city or town where such charter is granted. Such right cannot be denied by the municipality, nor is it necessary to obtain its permission, and this applies not only to the municipality which is to be supplied with water, but also to the laying of mains in the streets of a city or town which is situated between the source of supply and the city to be served.

There is usually a requirement in the contract for the granting of a charter, that the water company shall furnish an "ample supply" of

water for "first class fire protection," and also that the company furnish an adequate supply of "pure and wholesome" water, which means water which is ordinarily and reasonably pure and wholesome and fit for domestic use, and not necessarily that it should be chemically pure, but if the water does not conform to this standard, the company will be precluded from collecting rentals either from the municipality or private consumers, and may be liable in damages to persons injured by reason of impurity.

The laws of this state provide that either a municipality or a private citizen having a definite contract with a water company for a supply of water may maintain an action for damages resulting from the failure or insufficiency of the supply, unless caused by unavoidable accident without the company's negligence or fault. Several decisions have been rendered sustaining this rule in many of the States, although none apply to the State of Minnesota.

The laws presume, also, that a water company is liable in damages if its negligence in the construction or maintenance of its dams and reservoirs permits the leakage or escape of water so as to injure the property of others, or if it so pollutes or fouls the stream as to render it unfit for use by others having rights in it.

The water company must recognize the right of a riparian owner and see that streams which flow through or by his premises remain in their natural condition of purity, and free from any such contamination or pollution as renders them unfit for his domestic purposes, and he is under no duty to protect himself from injury through pollution at his own cost. The company may, however, prevent a riparian owner from using the water for bathing purposes, or from maintaining a large herd of cattle, cow-stables, hog-sties or a slaughterhouse on the banks of the stream, which might tend to pollute the water, and for injuries sustained from such pollution the water company might be found to be liable.

A water company or a city operating a waterworks plant has the right to make and enforce reasonable rules and regulations governing the supply of water to its customers and their use thereof, such as regulations to prevent the waste of water, or its use by persons who do not pay for it, and rules respecting the style and installation of plumbing, hydrants and other appliances, and the cost of connections and repairs, or providing that no more than a certain quantity of water per diem shall be used in any building without a special permit, or reasonably restricting the use of water for sprinkling the streets.

Therefore, it is clear that the water company is legally bound to so construct its plant as to prevent, in any way, surface waters overflowing from streams or rivers from entering its service. It also has been given, by competent counsel, that where a water company, in the construction of its plant, protects same against intermittent events, it could not be held liable for damage resulting from an unforeseen or unanticipated condition which might cause pollution.

The writer is of the opinion that a water company or a municipality which would grant the right to permit water to be connected to the domestic supply from a polluted source (in other words, a dual supply) for the purpose of fire protection, would and could be held responsible for any damages resulting from pollution of the water by reason of such act, and therefore it should be considered against good policy, and a legal risk, to grant such permission, even though numerous valves might be placed upon such connection with the view of preventing the injection of polluted water into the water supply. These valves, at the best, are mechanical contrivances and bound to go out of order, and, as already stated, the water company or municipality granting such permission, assumes a tremendous legal responsibility to the users of the water and should be restrained from granting such permission, especially in view of the fact that in addition to not complying with the terms of the franchise granting it the right to supply "pure and wholesome" water, it creates a legal hazard which might operate to its disadvantage.